SUPERIOR COURT OF CALIFORNIA,

COUNTY OF SAN DIEGO

HALL OF JUSTICE

TENTATIVE RULINGS - February 01, 2023

EVENT DATE: 02/02/2023 EVENT TIME: 01:30:00 PM DEPT.: C-65

JUDICIAL OFFICER: Ronald F. Frazier

CASE NO.: 37-2021-00033583-CU-TT-CTL

CASE TITLE: PQ-NE ACTION GROUP VS CITY OF SAN DIEGO [E-FILE]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

EVENT TYPE: Motion Hearing (Civil)
CAUSAL DOCUMENT/DATE FILED:

Petitioner PQ-NE Action Group's Petition for Writ of Mandate is GRANTED IN PART. (ROA 1, 49.)

This proceeding concerns Respondent City of San Diego's approval of a residential development known as a Junipers Project ("Project") located in the Rancho Penasquitos area. Real Parties in Interest Carmel Partners, LLC and Carmel Land, LLC ("RPIs") are the Project applicants.

Petitioner seeks a writ of mandate vacating the City's approval of the Project.

Whether the EIR Adequately Considers Cumulative Impacts

An Environmental Impact Report ("EIR") must consider a project's "cumulative impacts." (14 C.C.R. § 15130(a).) "[A] cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts." (14 C.C.R. § 15130(a)(1).) "The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and *reasonably foreseeable probable future projects*." (14 C.C.R. § 15355(b).)

Petitioner asserts the EIR failed to adequately consider the cumulative impact of the Project together with the Millennium PQ and Trails at Carmel Mountain Ranch projects. In opposition, Respondent and the RPIs assert these projects did not qualify for inclusion in the cumulative impacts study. Specifically, Respondent and the RPIs assert the City used the Project's Notice of Preparation of the EIR (April 10, 2018) as the cutoff date, and neither the Millennium PQ nor the Trails projects were analyzed because neither of these applications was "deemed complete" before this date. (AR 43:11381-11406; 15:4859.)

"[M]ere awareness of proposed expansion plans or other proposed development does not *necessarily* require the inclusion of those proposed projects in the EIR." (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127 (emphasis added).) However, "any future project where the applicant has devoted significant time and financial resources to prepare for any regulatory review *should be considered* as probable future projects for the purposes of cumulative impact." (*Id*. at pp. 1127-28 (emphasis added).) "Projects that are undergoing environmental review are reasonably probable future projects." (*Id*. at p. 1127.)

Here, the administrative record reflects both the Millennium PQ and Trails projects were reasonably probable future projects known to the City well before the draft EIR was published. The City attempts to assert it was not obligated to consider these projects because neither of the applications was "deemed

complete" before the Project's April 10, 2018 Notice of Preparation was issued. The court is not persuaded.

The EIR states the Millennium PQ application was deemed complete on June 14, 2019 and the Trails application was deemed complete on January 31, 2020. (AR 15:4859.) However, the record and judicially noticeable documents demonstrate the City was concurrently evaluating the Project, Millennium PQ, and the Trails for many months prior to the publication of the draft EIR. (AR 225:24408-24412, 15:4991; Pet. RJN at Exh. A.) The City was clearly aware Millennium PQ and Trails were reasonably probably future projects. Thus, the EIR fails to comply with CEQA because it did not adequately consider the cumulative impact of Millennium PQ, Trails, and the Project.

As to these grounds, the Petition is granted.

Whether the EIR Adequately Considers Wildfire Safety Impacts

"An EIR shall identify and focus on the significant effects of the proposed project on the environment." (14 C.C.R. § 15126.2(a).) This includes "any potentially significant direct, indirect, or cumulative environmental impacts of locating development in areas susceptible to hazardous conditions (e.g., floodplains, coastlines, *wildfire risk areas*)...." (*Ibid*., emphasis added.)

Within the context of wildfire safety impacts, Petitioner argues the EIR failed to consider the cumulative impacts of the Project together with the Millennium PQ (which will use the same evacuation exit) and Trails projects (which will significantly increase the number of evacuating residents). The court agrees and finds the EIR also fails to comply with CEQA because it did not adequately consider the cumulative impact of Millennium PQ, Trails, and the Project when evaluating the Project's wildfire safety risks.

In their opposition, Respondent and RPIs point out the RPIs commissioned a study on Millennium PQ's impact on evacuation times, and that the study concluded the community's evacuation time would only increase from 3.5 to 3.8 hours if Millennium PQ project were also considered. (AR 21:10659-10662.) As a preliminary matter, this study still does not take the Trails project into consideration. Further, "CEQA requires agencies to discuss a project's potentially significant impacts in the draft EIR and final EIR." (*Sierra Watch v. County of Placer* (2021) 69 Cal.App.5th 86, 103; see also 14 C.C.R. § 15120.) "[T]o the extent an agency omits an adequate discussion of a project's potential impacts in its EIR, it cannot afterward make up for the lack of analysis in the EIR through post-EIR analysis." (*Ibid*., citing *Save Our Peninsula Committee v. Monterey Cty. Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 130.)

Here, the RPIs submitted the study on the eve of the City Council hearing. (AR 21:10659.) The memo is dated June 11, 2021 and the City Council hearing was held June 15, 2021. No such analysis is contained in either the draft EIR or final EIR. Thus, the EIR fails to comply with CEQA requirements. This deficiency cannot be cured by post-EIR analysis, and in any event the post-EIR analysis is still insufficient because it does not consider the Trails project.

As to these grounds, the Petition is granted.

Petitioner also argues the EIR's wildfire analysis is not supported by substantial evidence, challenging several of the assumptions made in evaluating the Project's impact on evacuation. As to these grounds, the Petition is denied.

Third, Petitioner asserts the EIR obfuscates wildfire and evacuation risks because it uses a "voluntary" Fire Protection Plan and Wildfire Evacuation Plan. As to this issue, **the court will hear this matter**.

Whether the EIR Adequately Considers Transportation Impacts

Petitioner asserts the EIR did not adequately analyze and mitigate transportation impacts.

As to these grounds, **the court will hear this matter**.

Whether the EIR Adequately Considers Greenhouse Gas Impacts

Consistent with CEQA Guidelines, the City has a Climate Action Plan (CAP) Consistency Checklist. The City's CAP "was adopted to ensure that emissions from activities in the City would not exceed established state targets" and the Checklist "serves as the significance determination threshold for cumulative impacts related to climate change." (AR 16:6498.) "If a project is not consistent with the City's CAP, as determined through the CAP Consistency Checklist, a potentially significant cumulative GHG impact would occur." (AR 16:6474.)

Petitioner asserts the EIR did not adequately disclose and mitigate greenhouse gas impacts.

As to these grounds, the Petition is denied. There is substantial evidence in the record to support the EIR's conclusion the Project will not significantly impact greenhouse gas emissions.

Whether the EIR Adequately Considers Land Use Impacts

"The EIR shall discuss any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans." (14 C.C.R. § 15125(d).)

Petitioner asserts the EIR did not adequately disclose or mitigate the Project's land use impacts.

As to these grounds, the petition is denied. There is substantial evidence in the record to support the EIR's conclusion the Project is consistent with the City's General Plan, the Rancho Penasquitos Community Plan, and the San Diego Association of Governments' Regional Transportation Plan/Sustainable Communities Strategy.

Whether the EIR Adequately Considers Biological Impacts

Petitioner asserts the Project failed to adequately mitigate biological impacts. Petitioner's argument is not entirely clear here. Although the California Department of Fish and Wildlife made certain mitigation recommendations to the City in a comment on the Project, it appears these concerns were considered by the City, even if the recommendations were not incorporated into the Project's approval.

As to these grounds, the Petition is denied. There is substantial evidence in the record to support the EIR's conclusion the Project will not significantly impact biological resources.

Whether a Variance from the City's Affordable Housing Ordinance Should Have Been Granted

City Code requires affordable housing units to be "comparable in bedroom mix, design, and overall quality of construction to the market-rate" housing units. (San Diego Mun. Code § 142.1304(e)(2).) Variances may be sought under certain circumstances. (SDMC §§ 142.1310, 142.1311.)

Petitioner asserts the City's determination to grant a variance from its affordable housing ordinance lacked substantial evidence. The RPIs obtained a variance to provide an alternative mix of one- and two-bedroom units rather than a mix of two- and three-bedroom units. (AR 21:10189.)

As to these grounds, the Petition is denied. There is substantial evidence in the record to support the granting of a variance.

Requests for Judicial Notice

Petitioner's requests for judicial notice submitted with its moving papers are granted as to Exhibits A, B, and C and denied as to Exhibit D. (Evid. Code § 452(b), (c); ROA 50.) As to Exhibit D, judicial notice is

denied on the grounds it is not relevant.

Respondent's and RPIs' requests for judicial notice are granted. (ROA 55; Evid. Code § 452(c).)

Petitioner's requests for judicial notice submitted with its reply papers are granted. (ROA 58; Evid. Code § 452(c).)

However, all counsel are admonished for submitting separate, additional memoranda regarding the requests for judicial notice. Although the court considered these unauthorized memoranda, they are improper absent leave of court. "Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with rule 3.1306(c)." (Cal. R. Court, rule 3.1113(*l*).) The rule contemplates *a list of items*, not lengthy additional briefing. Any legal argument should have been included in the opening, opposition, and reply memoranda, not in the requests for judicial notice or other unauthorized memoranda. The rules requiring a separate document for a request for judicial notice may not be used to circumvent the court's rules regarding page limits for memoranda. (Cal. R. Court, rule 3.1113(d).)